

condition.² The ALJ did not award any additional impairment for claimant's bilateral upper extremity condition.

Respondent contends Judge Barnes erred in granting claimant the 12 percent functional impairment for her ongoing cervical complaints. Respondent argues claimant did not sustain any additional permanent impairment to her cervical spine as a result of the August 26, 2002, accident, beyond that which she already had before the accident. While respondent concedes claimant sustained a 3 percent functional impairment to her left upper extremity, respondent maintains claimant's neck condition is not permanently worse as a result of the accident and as such, she is entitled to no additional permanency. Consequently, respondent requests that the Board modify the July 19, 2005 Award to reflect the 3 percent impairment to the upper extremity.

Claimant contends the evidence sufficiently establishes she sustained an aggravation of her preexisting neck condition and that the ALJ correctly determined the nature and extent of claimant's injury and disability. Accordingly, claimant requests the Board affirm the Award.

The only issue before the Board on this appeal is the nature and extent of claimant's injury and resulting disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant acknowledges she has a history of neck and arm complaints which predate the August 26, 2002 accident. In 2001, claimant sought treatment with Dr. John Hered, who performed diagnostic tests including an MRI and a myelogram. Dr. Hered diagnosed a bulging disk at C3-4 and C4-5 with a larger and more problematic bulge at C5-6. He performed surgery, an anterior discectomy and fusion, at the C5-6 level on December 4, 2001. Claimant returned for a follow-up visit on December 19, 2001 and although she had expressed some earlier complaints about arm pain, she reported doing better. She was released to return to work, without restrictions, on January 7, 2002.

In August 2002, claimant was performing production work for the respondent. Her job duties included doing wiring on airplanes, which required her to physically pull, push, and grip with her hands and all of this was done overhead. Claimant would, at times, have to lift cables up to 50 pounds.

² As claimant was not requesting a work disability (a permanent partial general disability greater than the functional impairment rating), the ALJ limited claimant's recovery to her functional impairment.

On the day of the accident, claimant was working with a heavy cable along with three other people. As she was pulling on this cable, she began to notice some pain in her neck. Claimant went to the Human Resources Office to talk to someone about her neck pain. She was referred to the Emergency Center in South Seneca, who in turn referred her to Dr. Paul Stein.

Claimant first saw Dr. Paul Stein on September 10, 2002. At that time her chief complaint was neck and upper back pain. Dr. Stein noted that claimant had aching in her left arm to her elbow and had occasional tingling in her fingers. Dr. Stein evaluated claimant and opined that she had cervical disk disease, status post C5-6 anterior fusion. In order to rule out radicular irritation and left ulnar entrapment neuropathy, he ordered an MRI of the cervical spine.³ The MRI revealed some previous mild disk protrusion at C6-7 as well as a C3-4 mild disk bulge and encroachment on the left neural foramen.

When claimant's complaints did not subside with conservative treatment, Dr. Stein ordered a myelogram/CT scan. On November 7, 2002, the myelogram and CT scan films were reviewed and revealed a solid fusion with a minimal defect at C4-5 and no signs of nerve root impingement. He also had her undergo an EMG/NCT for complaints to her left upper extremity. When that test was not diagnostic, he released her to return to work without restrictions.

Dr. Stein testified that it was possible, but not his opinion, that claimant suffered an aggravation of a preexisting neck problem on the job in August 2002. He was more inclined to believe that claimant had a soft tissue injury. In coming to this opinion he indicated he had reviewed the earlier *reports* from the MRI and the subsequent MRI film itself. That comparison led him to the conclusion that claimant had sustained no additional physical changes. He further testified that he believed claimant had no increased permanent impairment when compared to her condition before the accident. Her earlier spine surgery left her with a DRE IV impairment (25 percent) and her condition has remained within that category, in spite of her subsequent increase of subjective complaints of pain. Dr. Stein testified that while claimant's ongoing complaints of pain certainly suggest she's suffered an aggravation, in his view the MRI results revealed no significant structural aggravations or changes. Thus, she has no further increase in impairment from that perspective. He did, however, suggest that for the soft tissue complaints, she would be entitled to an additional 5 percent permanent partial impairment to the whole body.

When claimant's neck complaints continued, she was referred to Dr. Eustaquio Abay, a neurosurgeon. Dr. Abay first saw her on January 6, 2004 and diagnosed a herniated disc at C4-C5 and C5-C6 small, bilateral upper extremity radiculitis, status post ACDF at C5-C6, and cervical spondylosis at C4-C5 and C6-C7. A CT and myelogram were ordered of the cervical spine. The myelogram/CT of cervical spine showed a good

³ Stein Depo., Ex. 2 at 8 (Sept. 10, 2002 report).

fusion at C5-C6, and small disc herniations at C4-C5 and C5-C6, but no neural compression or stenosis.

When asked if claimant had, in his view, suffered an injury on August 26, 2002, Dr. Abay testified as follows:

- Q. More probably true than not, or within a reasonable degree of medical probability, is the injury that was described here either a causative or aggravating factor in this change in pathology?
- A. Well, either one. I guess the records remain evident that there has been or there was a change following the event.
- Q. And the change that she has described in her symptoms would also be consistent, within a reasonable degree of medical probability, with an aggravation of a preexisting condition?
- A. Most probably.⁴

But he also testified that he reviewed both films from the myelograms, the one taken before her accident and the one done after, and concluded that while there were changes, there were “no really significant changes”.⁵ He also testified that someone who had previously had a neck fusion could probably be more susceptible to aggravation of the neck than someone who had not had a previous neck injury.⁶

- Q. Just so I clarify this for the record, Ms. Simpson having this neck fusion prior would increase the probability of her having some increased flexion and some problems above and below the fusion?
- A. In fact, it has been estimated the risk of degeneration above and below a level of fusion is about 30 percent, if the patient were active, to 35 percent if the patient were sedentary.
- Q. So, Doctor, isn't it true that it is equally as likely Ms. Simpson's current neck injury was caused by her previous C5, C6 fusion than by anything that happened at work?
- A. Again, except for the chronology of the symptoms. According to all the records we have reviewed, she was fine and doing fine until she got injured at work. That's when her symptoms began again.⁷

In June 2003, claimant was seen by Dr. John Hered, the surgeon who had treated her in 2001 and performed her neck surgery. Dr. Hered had the benefit of the diagnostic

⁴ Abay Depo. at 18.

⁵ *Id.* at 9.

⁶ *Id.* at 23.

⁷ *Id.* at 24.

films from both the 2001 events and in 2002 and 2003. Unlike Dr. Stein, Dr. Hered believed that claimant had a slight structural change in her spine at C6-7 following the August 26, 2002 accident. And while he's not sure that the change is significant, claimant has clearly voiced more pain complaints following that event and for that reason, he concedes the August accident aggravated her condition.

On May 24, 2004, claimant saw Dr. Pedro Murati at her lawyer's request. At that point her chief complaints were of neck pain, pain in both shoulders, and numbness and tingling in both hands.⁸ Dr. Murati opined that claimant had "neck pain secondary to polyradiculopathy secondary to aggravation of preexisting neck surgery, status post left ulnar cubital release, right ulnar cubital syndrome, bilateral carpal tunnel syndrome."⁹ He rated claimant at 12 percent permanent partial impairment to the whole body. According to Dr. Murati, this takes into account claimant's preexisting impairment of 15 percent under DRE III (for her earlier surgery) and her subsequent movement into DRE category IV as a result of her accident.

In addition to the 12 percent assessed for the cervicothoracic complaints, Dr. Murati assigned a 10 percent impairment to the right upper extremity for carpal tunnel syndrome, 10 percent to the right upper extremity for right ulnar cubital syndrome, which combine for a 19 percent impairment to the right upper extremity and converts to a 11 percent whole person impairment. He also assigned a 10 percent impairment to the left upper extremity for left carpal tunnel syndrome and a 10 percent impairment to the left upper extremity for status post left ulnar cubital release, which combine for a 19 percent impairment to the right upper extremity and converts to a 11 percent whole person impairment. He then combined the whole person impairments to get a 31 percent whole person impairment.¹⁰

Claimant was also evaluated by Dr. Chris Fevurly on November 19, 2004, at the request of respondent's attorney. At this time she was continuing to complain of neck pain radiating into the left back shoulder and into her fingers. She also had aching and pain in her arms, with her left arm being more symptomatic.

Dr. Fevurly diagnosed claimant with advanced cervical degenerative disc disease and spondylosis. He further opined that claimant's work event on August 26, 2002¹¹ caused an aggravation of the preexisting cervical degenerative disc disease and C5-6 fusion, and that she had a redevelopment of neck pain and left C6 radiculitis. However,

⁸ Murati Depo., Ex. 2 at 1.

⁹ *Id.*, Ex. 2 at 4.

¹⁰ *Id.*, Ex. 2 at 4-5.

¹¹ Dr. Fevurly's November 20, 2004 report incorrectly lists the date of accident as August 27, 2002 when in fact, it was August 26, 2002.

he concluded there was no ratable change in her permanent impairment because claimant had a preexisting 15 percent functional impairment under DRE category III and she remained within that category after her most recent accident. He also noted the development of left ulnar neuritis which was actually diagnosed four months after her work incident. With respect to claimant's left ulnar nerve complaints, he rated claimant with a 3 percent impairment to the upper extremity.¹²

The ALJ concluded that Dr. Murati's opinion "best reflects the facts as determined by the Court, namely, that [c]laimant did aggravate her pre-existing cervical condition."¹³ Thus, she awarded claimant the 12 percent for the cervical condition offered by Dr. Murati. For whatever reason, the ALJ failed to award claimant any permanent impairment for either her left or right upper extremity complaints.

After considering all of the evidence and the parties' arguments, the Board concludes the ALJ's finding of 12 percent to the whole body should be affirmed, albeit for a somewhat different factual and legal reasoning than expressed (or unexpressed) by the ALJ. The Board is persuaded that claimant has suffered an aggravation of her preexisting cervical condition. The uncontroverted evidence is that claimant was doing well following her neck surgery in 2001 and had required no further treatment until August 26, 2002, when she suffered an accidental injury while pulling on a heavy piece of wiring.

Like the ALJ, the Board is persuaded by the opinions of Dr. Murati that claimant's condition worsened and is now within DRE IV and that she has suffered an increase in her overall impairment. It is worth noting that Dr. Stein agrees that claimant's present impairment falls within DRE IV. DRE IV provides for an increase in impairment to 25 percent, a total of 10 percent more than the 15 percent provided for in DRE category III. Neither counsel for the parties questioned Dr. Murati about his statement that claimant's increased impairment was 12 percent, a figure not borne out by the *Guides* when considering the difference in ratings from category III to IV. This appears to be nothing other than a clerical oversight and as such, the Board finds that claimant's increased impairment should have been 10 percent rather than the 12 percent assigned by the ALJ. For that reason, the Award shall be modified to grant claimant a permanent partial impairment to the whole body of 10 percent for her cervicothoracic condition.

In addition as noted before, the ALJ failed to provide any impairment for claimant's upper extremity complaints. While the onset of her right upper extremity complaints were significant after her August 26, 2002 accident, and there are some musings within the record that those complaints are due to repetitive use, that is something that is not at issue in this claim. But there is apparently no dispute that her left upper extremity complaints are

¹² Fevurly Depo., Ex. 2 at 8.

¹³ ALJ Award (Jul. 19, 2005) at 4.

compensable. Indeed, respondent concedes that it is responsible for the 3 percent to the upper extremity assigned by Dr. Fevurly. That being the case, the Board finds that claimant is entitled to the 3 percent to claimant's left upper extremity.

When the 3 percent to the left upper extremity is converted and combined with the 10 percent to the whole body, the net result is, pursuant to the *Guides*, 12 percent, the figure originally found by the ALJ. Accordingly, the ALJ's Award is affirmed, but for the different legal and factual reasons.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Nelsonna Potts Barnes dated July 19, 2005, is affirmed but clarified.

IT IS SO ORDERED.

Dated this ____ day of November, 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: R. Todd King, Attorney for Claimant
Michael D. Streit/Janell Jenkins Foster, Attorneys for Respondent and its Ins. Carrier
Nelsonna Potts Barnes, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director